No. 78-68

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

AURORA GAZMIN NAVARRO,

Petitioner,

vs.

DISTRICT DIRECTOR OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

CASES CITED

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order and opinion of the U.S. Court of Appeals for the Seventh Circuit entered April 12, 1978.

OPINIONS BELOW

The case was initiated when the District Director of the Immigration and Naturalization Service revoked approval of Petitioner's third preference petition by order dated November 13, 1973. The Petitioner appealed this order to the Regional Commissioner of the Immigration and Naturalization Service which affirmed the District Director by decision dated January 23, 1974 and denied Petitioner's motion for reconsideration on August 26, 1974. Petitioner filed her Complaint for Declaratory Judgment in the United States District Court for the Northern District of Illinois. That court granted Respondent's Motion to Dismiss and for Summary Judgment in an unpublished opinion dated July 17, 1975. Petitioner appealed the District Court's decision and is seeking review of the as yet unreported order and opinion of the United States Court of Appeals for the Seventh Circuit entered on April 12, 1978 which reversed, on rehearing, its opinion in favor of Petitioner officially reported at 562 F. 2d 1024 (7th Cir. 1977). These orders and opinions are set out in the Appendix.

JURISDICTION

The Court of Appeals rendered its order and opinion on petition for rehearing on April 12, 1978. This petition is filed within 90 days from April 12, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in affirming the District Director's revocation of Petitioner's third preference petition, a revocation alleged to be arbitrary, capricious and contrary to law?

(2) Whether the Court of Appeals erred in allowing the District Director to impose more burdensome requirements on an alien living in the United States than on one living abroad?

(3) Whether the Court of Appeals erred in denying the existence of an estoppel against the District Director of the Immigration and Naturalization Service and whether the latter's issuance of his letter approving Petitioner's third preference petition constituted "affirmative misconduct" required to estop the government. *Cf. Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5, 38 L.Ed. 2d 7, 94 S.Ct. 90 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Federal Statutes provide in relevant part:

Section 101(a)(32) of the Immigration and Nationality Act (Act), 8 U.S.C. §1101(a)(32):

> The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

Section 203(a)(3) of the Act, 8 U.S.C. §1153(a)(3):

> Aliens who are subject to the numerical limitations specified in section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> • • •
>
> (3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are members of the professions, or who because of their

exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States.

Section 205 of the Act, 8 U.S.C. §1155:

REVOCATION OF APPROVAL OF PETITIONS

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 235 and 236.

All other statutory provisions involved are set forth in the Appendix.

STATEMENT OF THE CASE

The Petitioner, Aurora Gazmin Navarro, is a graduate of Dagupan College School of Nursing, Dagupan City, P.I., is licensed to practice as a registered nurse in the Philippines, and practiced her profession in that country from 1968 to 1971. In February 1971 Petitioner entered the United States as a non-immigrant exchange visitor which enabled her to study at Kansas City General Hospital and Medical Center in the graduate nurses training program. While studying she filed her petition for third preference status pursuant to Section 203(a)(3) of the Immigration and Nationality Act, as amended, (the "Act"), 8 U.S.C. 1153(a)(3). While working and studying at the hospital,

Petitioner, on October 4, 1971 received approval of her third preference petition from Respondent, the District Director of the Immigration and Naturalization Service. She has practiced in the nursing field as a graduate nurse or nursing technician since the time of her entry.

In 1972 Petitioner completed course work required by the State of Kansas to take its licensing examination for registered nurse and as of current date has passed three of five sections of that examination in both Kansas, and later, in Illinois. She is presently studying to take the remaining two sections of the Illinois examination in July of 1978. If she succeeds, she will be licensed as a registered nurse in the State of Illinois.

Her approved petition stated "[t]he approval of a petition for third or sixth preference classification is valid for as long as the supporting labor certification is valid and unexpired, provided in the case of a petition for third preference classification there is no change in the beneficiary's intention to engage in the indicated profession . . ." (App. 19).

On July 11, 1973 Respondent notified Petitioner ". . . it does not appear you should have been awarded third preference; and this office contemplates revocation of the approved visa petition". The reason given was her failure to become licensed as a registered nurse. Petitioner advised the director that she was taking the examination again and he delayed his decision until she received the results. His letter of November 13, 1977 then advised the Petitioner:

> "Your petition for third preference was approved because you claimed you expected to be employed as a member of the professions. Inasmuch as you again failed to pass the licensure test of the Missouri State Board of Nursing on September 12-13, 1973, you have not as yet qualified as a registered nurse, but have

had to accept employment in a lesser capacity. Since you entered the United States on February 10, 1971, to take Graduate Nurse Training, it is believed you have had ample opportunity to qualify as a registered nurse.

You have failed to establish that you qualify as a member of the professions as outlined in Section 203 (a)(3) of the Immigration and Nationality Act, as amended." (App. 44).

Petitioner appealed the order of revocation to the Regional Commissioner who upheld the District Director's Decision on January 23, 1974 (App. 41) and denied a motion to reconsider on August 26, 1974 (App. 37). The District Director then notified Petitioner to depart the United States on or before March 8, 1974.

Petitioner filed her complaint against Respondent for Declaratory Judgment in the United States District Court for the Northern District of Illinois on October 16, 1974. The Respondent's motion to dismiss the complaint and for summary judgment was granted on July 17, 1975. The court determined that it lacked jurisdiction and that the District Director had not been "arbitrary or capricious" in revoking her petition. (App. 33). Petitioner appealed and the Seventh Circuit Court of Appeals, in its decision reported at 562 F. 2d 1024 (App. 13), vacated the judgment of the District Court. It found that the District Court did have jurisdiction and that "defendant did not have the authority to revoke the October 4, 1971 notice on the ground that he gave, nor on the grounds given by the Regional Commissioner". (App. 27). The case was remanded to the District Court on an issue which both sides concede is not relevant.

Respondent petitioned the Court of Appeals for rehearing. That court, on rehearing, affirmed the decision of the District Court "on the merits". (App. 1).

REASONS FOR GRANTING THE WRIT

The decision of the District Director, affirmed by the court below is arbitrary, capricious and at odds with numerous decisions of the Board of Immigration Appeals and a decision of the California District Court in the construction of Section 203(a)(3) of the Act. If allowed to stand, it will interfere with the ability of the District Directors of Immigration and Naturalization to perform their administrative duties both in the issuance and revocation of third preference petitions, frustrate Congressional intent and cause uncertainty to countless immigrants similarly situated to Petitioner.

The decision denies Petitioner the equal protection of the laws secured to her by Amendment V of the United States Constitution.

The decision also raises a question as to what constitutes affirmative misconduct on the part of the government (See *Immigration and Naturalization Service, op. cit.*) so as to estop it in an immigration matter.

I.

THE REVOCATION OF THE PETITION IS ARBITRARY AND CAPRICIOUS, FRUSTRATES CONGRESSIONAL INTENT AND INTERFERES WITH PROPER ADMINISTRATION OF THE IMMIGRATION AND NATIONALITY ACT

Third preference petitions issued pursuant to Section 203(a)(3) of the Act are issued under a Congressional intent to bring aliens to this country who will work in a professional capacity to benefit and enrich the United States.

When she applied, Petitioner was not required to be sponsored by an employer, as a nonprofessional sixth preference applicant would have been, but was merely required to have the intent to practice her profession. As the Board of Immigration Appeals states in *Matter of Semerjian,* 11 I & N Dec. 751 (1966) at 754:

> "Since an applicant for a visa under Section 203(a)(3) may be a member of a profession for which a license, or even citizenship may be a prerequisite before he may engage in his professional endeavor, we do not read into the statutes or regulations a requirement that the applicant must be able to engage in the qualifying profession immediately if admitted to the United States. It is sufficient if he can show a bona fide purpose or intends to engage in his profession or in a field related thereto . . ."

Petitioner has clearly demonstrated her intent to practice as a registered nurse. She had been employed continuously in the United States as a graduate nurse or nursing technician, has continued her education and repeatedly attempted to pass the registered nurse examination. She has been successful as to three of five sections of the examination and is about to retake the two sections which she has not passed.

The revocation of her approved petition is at odds with all reported cases holding arbitrary and capricious both denial of approval and revocation of approved petitions for third preference under similar factual circumstances.

In the only reported case dealing with a nurse, *Matter of Gutierrez,* 12 I & N Dec. 418 (1967), the District Director ordered that third preference status be given to a Filipino nurse since ". . . she received a diploma upon the successful completion of a three year course of study at an accredited school of nursing in the Philippines. Under

the criteria discussed above she is regarded as a professional nurse." *Id.* at 420.

Factora v. *District Director of U.S. Immigration and Naturalization Service,* 292 F. Supp. 518 (C.D. Cal., 1968) held that denial of approval of a business graduate's petition, despite the fact that he was working in a nonprofessional capacity, was arbitrary and capricious. The court cited the following language from *Matter of Chu,* 11 I & N Dec. 881 (1966) with approval:

> "On March 18, 1965, the Secretary of Labor testified before a subcommittee of the House Committee in the Judiciary regarding certain aspects of H.R. 2580 which, as amended was enacted as P.L. 89-236. In advocating that specific job offers not be required for highly educated and specialized immigrants, such as those now encompassed in the third preference, the Secretary stated that the addition to this country of those immigrants would be a definite boon to the American culture and work force. He agreed that this would be so even if the alien would not occupy one of the specific skills for which he merited consideration as a preference alien, and stated that the alien should be 'free to climb' ". *Factora* at 522.

Similar conclusions were drawn in *Matter of Naufahu,* 11 I & N Dec. 904 (1966) where denial of a petition was held arbitrary and capricious despite the fact that the petitioner was a lawyer and would not be licensed to practice until he became a citizen, a procedure which takes five years. See also *Matter of Ulanday,* 13 I & N Dec. 729 (1971). In another case, *Matter of Stamatiades,* 11 I & N Dec. 643 (1966) the approval of the petition of the holder of a bachelor's degree in biology, though he was working as a nonprofessional, was ordered.

We therefore submit that the revocation of Petitioner's approved third preference petition and consequent loss of

her right thereunder to remain in the United States is arbitrary, capricious and contrary to law. To allow it to stand will cause confusion in the adjudication of third preference petitions. Since up to 10% of all visas issued may be within this third preference category, *Cf.* Section 203(a) of the Act, countless immigrants will be affected by this ruling, thus justifying the issuance of a writ.

II.

THE DISTRICT DIRECTOR'S APPLICATION OF THE LAW IS A DENIAL OF THE EQUAL PROTECTION OF THE LAW

It is essential that the writ should issue to prevent application of a discriminatory double standard, resulting in an unequal application of and, hence, denial of equal protection of the law in the case at bar and in similar cases which, perforce, will arise hereafter. This double standard arises in that an applicant for third preference classification who applies for such while residing in the United States is, by the now affirmed decision of the District Director, required to meet a professional standard not required of a successful applicant for third preference classification who, for example, resides in the Philippines. Assuming, *arguendo,* that Petitioner, a registered nurse in the Philippines, applied for and received approval of her third preference petition while residing there, she would *never* be required to pass a licensing examination to retain her approved petition in this country and to become a citizen. On the contrary, and, we submit, in derogation of the principle of equal protection embodied in the Fifth Amendment concept of due process, the District Director has required Petitioner, residing in the United States, to pass such an examination *before* receiving her immigrant visa.

Under the assumption, Petitioner would have entered the United States as an immigrant, or permanent resident, a status which can be rescinded only by a deportation or exclusion proceeding. Grounds for deportation are specifically enumerated in Section 241 of the Act, 8 U.S.C. 1251 and for exclusion in Section 212 of the Act, 8 U.S.C. 1182. Neither statute includes nor encompasses failure to pass a licensing examination as grounds for either deportation or exclusion. Notwithstanding, the District Director has determined, and the Seventh Circuit affirmed, that Petitioner is to be deported, not for any ground required by Sections 212 or 241 of the Act, but under the amorphous "good and sufficient cause . . ." language of Section 205 of the Act, 8 U.S.C. 1155, and, further, notwithstanding that the underlying labor certification still exists and Petitioner is still practicing as a graduate nurse. For the Service to utilize this provision to exact another qualification from Petitioner which could not be required had she awaited her immigration visa on an approved third preference petition while residing in the Philippines is, we argue, a patent denial of equal protection.

There is no reason for the Immigration and Naturalization Service to give preferential treatment to an alien because he or she resides abroad. The federal government is bound by the due process clause of the Fifth Amendment of the United States Constitution to operate under principles of equal protection, *Mathews* v. *De Castro,* 429 U.S. 181, 50 L. Ed. 2d 389, 97 S. Ct. 431 (1976). A writ should issue to prevent this unconstitutional discrimination.

III.

THE GOVERNMENT IS ESTOPPED TO REVOKE PETITIONER'S APPROVED THIRD PREFERENCE PETITION ON THE GROUNDS ASSERTED

The District Director's approval of Petitioner's third preference petition stated that the approval would be valid for as long as the underlying labor certification remained valid and there was no change in the beneficiary's intention to engage in her profession. The Court of Appeals originally held that the government was estopped from asserting other grounds against her in revoking its approval, but reversed itself on rehearing. We submit that such holding on rehearing is in error.

This Court has held, *U.S. Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5, that to estop the government "affirmative misconduct" on its part must be shown in addition to the other elements. We submit that the act of the INS in originally approving Petitioner's third preference petition "for as long as the supporting labor certification is valid and unexpired, provided • • • there is no change in [her] intention to engage in the [nursing] profession • • •." while making a mental reservation further conditioning continuing approval on Petitioner's passing certain examinations is patently misleading and constitutes the affirmative misconduct element of *Hibi*. Hence the initial decision of the Seventh Circuit, holding the Service estopped, was correct and the attempt to circumvent estoppel by employing a *deus ex machina*, viz, Section 205 of the Act, 8 U.S.C. 1155, to extricate the government should not be permitted to succeed.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that a Writ of Certiorari issue to the Court of Appeals of the Seventh Circuit to review its decision and grant the relief this Court deems just and appropriate in accordance with this Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1779

AURORA GAZMIN NAVARRO,

Plaintiff-Appellant,

v.

DISTRICT DIRECTOR OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-C-2975—Thomas R. McMillen, Judge.

ON PETITION FOR REHEARING

Decided April 12, 1978

Before FAIRCHILD, *Chief Judge,* PELL, *Circuit Judge,* and WYZANSKI, *Senior District Judge.**

WYZANSKI, *Senior District Judge.* This case is now before us on defendant's petition for re-hearing.

Our opinion dated September 13, 1977 (562 F.2d 1024) was rendered without our attention having been called to

* Senior District Judge Charles E. Wyzanski, Jr. of the District of Massachusetts is sitting by designation.

Section 205 of the Immigration and Nationality Act, as amended, 8 U.S.C. §1155, or to 8 C.F.R. 204.4(b) 1972. Now that our attention had been drawn to these crucial matters, we withdraw our September 13, 1977 opinion and vacate our judgment which had vacated the District Court's judgment. Informed by new briefs filed by the parties, we approach this case afresh.

Plaintiff is an alien who, relying on the Declaratory Judgment Act, 28 U.S.C. §2201, seeks a declaration that by virtue of a notice, dated October 4, 1971, she has a valid effective, unrevoked third preference status under Section 203(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(3). Defendant is the District Director of the Immigration and Naturalization Service, who issued the aforesaid October 4, 1971 notice, but who on November 13, 1973 notified plaintiff that she failed to qualify under Section 203(a)(3), and who on February 8, 1974 notified her that she was required to depart from the United States on or before March 8, 1974.

The following are the facts disclosed by the administrative record of the Immigration and Naturalization Service.

Plaintiff, Mrs. Navarro, is a native-born citizen of the Philippines. In April 1968 Dagupan Colleges School of Nursing in the Philippines awarded her, on the basis of 5 years study, a diploma as a graduate nurse. In the same year the Philippine government gave her a license to practice as the equivalent of a registered nurse. From 1968 to 1971 she was employed in the Philippines as a nurse.

January 18, 1971 the United States Department of State, under Section 101(a)(15)(j) of the Immigration and Nationality Act, issued to plaintiff a certificate of eligibility for exchange visitor status. This enabled her to engage from February 1, 1971, to January 31, 1972 at Kansas City

General Hospital and Medical Center in "an approved course in graduate nurses' training for qualified foreign nurses."

August 11, 1971, after her arrival in the United States, plaintiff filed with the Immigration and Naturalization Service [INS] a petition for classification, under §203(a)(3) of the Act, as a "third preference immigrant," that is, "an alien who is a member of the professions."

October 4, 1971, on Form 1-464 E (Rev. 2-1-71)N, the INS sent to plaintiff a "Notice of Third . . . Preference Petition Approved Under Section 203(a)" of the Act. In the text of the notice was a box with the heading "Validity" and with the statement that "[t]he approval of a petition for third or sixth preference classification is valid for as long as the supporting labor certification is valid and unexpired, provided in the case of a petition for third preference classification there is no change in the beneficiary's intention to engage in the indicated profession . . ." It was further noted, "The petition has been approved. The petition states that the beneficiary is in the United States and will apply for adjustment of status to that of a lawful permanent resident. A visa number is not presently available; therefore, the beneficiary may not apply for adjustment of status to that of a permanent resident. The beneficiary has been or will be notified concerning his stay in the United States."

An undated, unsigned Form 1-461 (Rev. 1-27-70), on the stationery of the INS, reached plaintiff possibly together with, or shortly before or after, Form 1-464E (Rev. 2-1-71)N. The opening paragraph informed plaintiff that:

> "The preference visa petition filed in your behalf has been approved. However, an immigrant visa is not now available to you. Therefore, you are not eligible

at this time to apply for adjustment of your status to that of a lawful permanent resident. Under the circumstances you are hereby granted permission to remain in the United States until further notice. Continuation of this privilege is conditioned upon your retention of the status established in the approved petition."

It should be noted that the just-quoted grant of permission to remain in the United States appears only in an apparently unsigned letter and is not mentioned in the October 4, 1971 Form 1-464 E (Rev. 2-1-71)N.

After plaintiff's contract with the Kansas City General ended, she applied to the Missouri State Board of Nursing to take the 1971 examination because she had not studied sufficient psychiatry. In 1972 she completed her units in psychiatry by taking courses at Penn Valley Community College. Plaintiff then took in December 1972 and again in March 1973 the state nursing examinations. She passed the Medical, Pediatric, and Obstetrics examinations, but failed the Surgical and Psychiatric examinations. Nonetheless, the Missouri State Board of Nursing approved the Trinity Lutheran Hospital's hiring plaintiff as an unlicensed practical nurse.

According to plaintiff's evidence, the state board did not allow plaintiff to take the examinations in June 1973 because there were too many applicants. But the Board advised her to take them in September, 1973.

July 11, 1973, the District Director wrote plaintiff as follows:

Dear Mrs. Navarro:

On September 20, 1971, your petition to accord you third preference status as a registered nurse was approved, and you were permitted to remain in the United States pending availability of a visa number.

Although you have been in the United States since February 10, 1971, you have not yet been licensed as a registered nurse by the Missouri State Board of Nursing.

Since you have failed to qualify as a registered nurse in over two years following entry, it does not appear you should have been accorded third preference; and this office contemplates revocation of the approved visa petition. You may furnish evidence by July 31, 1973, as to why you do not think the petition should be revoked. If the petition is revoked, you will have the right of appeal to the Regional Commissioner of the Service.

Sincerely,
H. I. Major
District Director

July 17, 1973 plaintiff, in reply to the District Director's letter, set forth alleged facts as to why her approved third preference petition should not be revoked.

November 13, 1973, following Mrs. Navarro's third unsuccessful attempt to pass the Missouri nursing examination, the District Director gave this explanation of his action:

On July 11, 1973, you were put on notice of our intention to revoke your third preference petition approved September 20, 1971, because you had not qualified as a registered nurse in the state of Missouri. Because of your representations that you had been approved to rewrite the Missouri State Board of Nursing examination in September, 1973, you were informed that a decision would be deferred pending results.

Your petition for third preference was approved because you claimed you expected to be employed as a member of the professions. Inasmuch as you again failed to pass the licensure test of the Missouri State Board of Nursing on September 12-13, 1973, you have not as yet qualified as a registered nurse, but have

had to accept employment in a lesser capacity. Since you entered the United States on February 10, 1971, to take Graduate Nurse Training, it is believed you have had ample opportunity to qualify as a registered nurse.

You have failed to establish that you qualify as a member of the professions as outlined in Section 203 (a)(3) of the Immigration and Nationality Act, as amended.

Plaintiff appealed to the Regional Commissioner. January 23, 1974, the Regional Commissioner "upheld" the District Director's decision, and on August 26, 1974, he, with opinion, denied a motion to reconsider. Meanwhile, February 8, 1974 the District Director, on Form 1-210 (Rev. 9-1-70)N, notified plaintiff that she was "required to depart from the United States . . . on or before March 8, 1974."

Following the Regional Commissioner's refusal to reconsider his decision, plaintiff brought this action, October 16, 1974, against defendant District Director. The latter filed a motion to dismiss the complaint and for summary judgment. July 17, 1975 the District Judge granted the motion for reasons set forth in an accompanying memorandum. While expressing the view that plaintiff had proceeded improperly and prematurely, that she should have awaited a deportation order, and that she presented no actual case or controversy, the judge, nevertheless, declared that "the complaint fails to allege any basis for finding that the action of the District Director of the Immigration and Naturalization Service was arbitrary or capricious, or was in excess of his legal authority."

From the District Court's judgment dismissing the complaint, plaintiff has appealed to this Court.

The initial question is whether the District Court correctly held that it had no jurisdiction of this case because

the only available judicial remedy for Navarro was to await a deportation order and then, if she chose, to petition for a writ of habeas corpus.

We differ from the District Court's conclusions on jurisdiction. What plaintiff now seeks includes a declaration that, by virtue of the notice of October 4, 1971 on Form 1-464E (Rev. 2-1-71)N, she has a valid effective, unrevoked third preference status. If she does, it follows that when a visa does become available at a consular office she, no matter where she is then living, will have a priority in securing that visa, if she is otherwise qualified for entry. Independently of deportation, this is a valuable right. We are of opinion that the Declaratory Judgment Act, 28 U.S.C. §2201, furnishes a basis for her invocation of federal question jurisdiction, 28 U.S.C. §1331(a), to have this right declared, and that she need not await a deportation order.

We do not rely for jurisdiction on the Administrative Procedure Act, inasmuch as that channel of review seems blocked by the opinion and judgment in *Califano* v. *Sanders*, 430 U.S. 99 (1977).

While this Court has jurisdiction to determine plaintiff's right to maintain the status conferred upon her by the October 4, 1971 notice, we must make our determination upon the administrative record before the INS. Cf. *Song Jook Suh* v. *Rosenberg*, 437 F.2d 1098, 1102 (9th Cir. 1971); *Wang Ching Shek* v. *Esperdy*, 304 F.Supp. 1086 (S.D.N.Y. 1969). We do not agree with the implications in plaintiff's prayers that the District Court was empowered to conduct a *de novo* hearing to determine "whether the plaintiff . . . is eligible and qualified for Third Preference Status" or whether plaintiff is "a professional as said term is defined in Section 203(a)(3)" of the Act. See *Kessler* v. *Strecker*, 307 U.S. 22 (1939).

Bearing in mind that it is the executive branch of government which initially determines whether to issue a warrant for arrest of an alien believed to be deportable and which, in appropriate cases, issues warrants for deportation, and recognizing that an order directing an alien to depart does not purport to be either a warrant for arrest or a warrant for deportation, we see no basis for the prayers in plaintiff's complaint asking the District Court to "review the record of the Administrative body and its order directing the departure of the plaintiff" and "restraining the defendant from enforcing the departure of the plaintiff . . . from the United States pending the final determination of the case." See *Kladis* v. *INS,* 343 F.2d 513, 515 (7th Cir. 1965). If the pleading had been properly drawn, the District Court no doubt would have seen that it had federal jurisdiction limited to the issues as to what status if any plaintiff had as a result of the October 4, 1971 notice and of the later administrative revocation of an approved petition.

Coming to the merits of the issues before us, we are faced with the text of the October 4, 1971 notice accompanied by a letter on INS stationery. Indubitably, the notice says that the status of third class preference is "valid for as long as the [Secretary of Labor's] supporting labor certificate is valid and unexpired, provided in the case of a petition for third class preference classification there is no change in the beneficiary's intention to engage in the indicated [nursing] profession."

Unfortunately, neither the notice nor the letter calls attention to Section 205 of the Act, 79 Stat. 916, 8 U.S.C., §1155 which provides that:

> "Sec. 205. The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under Section 204. Such revocation shall be effective as of the date of the approval of any such petition. . . ."

In the just quoted section 205 the reference to section 204 makes it appropriate to set forth the following part of section 204, 8 U.S.C. §1154:

> "Sec. 204(a) . . . any alien desiring to be classified as a preference immigrant under section 1153(a) of this title . . . may file a petition with the Attorney Counsel for such classification. . . .
>
> (b) . . . the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien . . . is eligible for a preference status under section 1153(a) of this title, approve the petition. . . ."

Thus, although the District Director did not so inform the alien, the Attorney General had been given by Section 205 of the Act a power, "at any time, for what he deems to be good and sufficient cause," to revoke his approval of plaintiff's petition.

This broad statutory grant of authority to the Attorney General was explicitly preserved by 8 C.F.R. 204.4(d) and 205.2 (1972) which provided that:

> "204.4(d) *Revocation.* The validity of any petition under this section [§204 of the Act] may be revoked pursuant to the provisions of Part 205 of this chapter [§205 of the Act] prior to the time limitations set forth herein."
>
> "205.2 *Revocation on Notice.* The approval of a petition made under section 204 of the Act and in accordance with Part 204 of this chapter may be revoked on any ground other than those specified in §205.1 by any officer authorized to approve such petition when the propriety of such revocation is brought to the attention of the Service, including requests for revocation or reconsideration made by consular officers."

We are thus faced with these questions: (1) did the Attorney General or his delegate find good and sufficient

cause for revoking the approval of plaintiff's petition for third preference status; and (2) if so, is the Attorney General or his delegate estopped from relying on that cause because of representations made when the petition was approved?

The first question demands a reading of the notices sent by the District Director to the plaintiff.

In his July 11, 1973 letter, the Director wrote to plaintiff that "Since you have failed to qualify as a registered nurse in over two years following entry, it does not appear you should have been accorded third preference; and this office contemplates revocation of the approved visa petition." The uncontradicted evidence supports the first clause: that is, the finding that the plaintiff had failed to qualify as a registered nurse in over two years following entry. The second clause has a logical fallacy: that is, it states that a situation which occurred only in 1973 is a reason for not having granted a petition in 1971. However, the logical error in the second clause may be ignored inasmuch as the first clause furnishes both logical and policy grounds adequate to justify the Attorney General's delegate stating that his office contemplates revocation of the approved visa petition.

Moreover, the Director's November 13, 1973 letter clarifies any ambiguity in his July 11 letter. This second letter begins with the sentence "On July 11, 1973 you were put on notice of our intention to revoke your third preference petition approved September 20, 1971, because you had not qualified as a registered nurse in the State of Missouri." The second letter then correctly recites, and the evidence proves, that plaintiff had not so qualified.

We conclude that the only reasonable interpretation of the foregoing correspondence is that it constitutes action by an authorized delegate of the Attorney General revok-

ing his 1971 approval of plaintiff's petition for third preference status. Obviously, both the plaintiff and the Regional Commissioner so interpreted the letters, for she appealed the District Director's decision to the Regional Commissioner and he upheld it. Finally, the District Director on the basis of the revocation notified plaintiff "to depart from the United States . . . on or before March 8, 1974."

We further conclude that the revocation was authorized by Section 205 of the Act. When the Attorney General's delegate finds that a person had not qualified as a registered nurse within two years after her admission to the United States, despite an indication that this was expected, the Attorney General may deem the person's failure so to qualify "good and sufficient cause" to "revoke the approval" of that person's petition "effective as of the date of approval of . . . such petition." Our conclusion is in accordance with *Wright* v. *INS*, 379 F.2d 275, 276 (6th Cir. 1976), *Scalzo* v. *Hurney*, 225 F.Supp. 560, 561, 562 (E.D. Pa. 1963) affirmed, 338 F.2d 339 (3rd Cir. 1964), *Mantyke* v. *Sahli*, 161 F.Supp. 199 (E.D. Mich. 1958).

Addressing the question of estoppel, we are *now* persuaded that there is neither a factual nor a legal basis for plaintiff's contention that the October 4, 1971 INS notice and the apparently accompanying letter constitute an estoppel precluding the Attorney General or his delegate from exercising the power of revocation conferred by Section 205 of the Act.

Neither the notice nor the letter refers to Section 205. Nothing in the text of either document expressly purports to waive or limit the Attorney General's power under Section 205. The October 4, 1971 notice points out that the validity of the third preference classification will terminate if the supporting labor certification terminates; but it does not imply that validity may not be terminated for other reasons. Obviously, for example, if the petitioner made a

fraudulent statement in her petition, the Attorney General would not be estopped from revoking his approval on that ground even though it was not specified in the notice. We, on reflection, see no sound basis for distinguishing the right of the Attorney General to revoke his approval on the ground that petitioner did not, as expected, become a registered nurse in the United States, even though the notice confirming status did not specify that ground of potential revocation.

We may add that, taken as a whole, the record plainly indicates that the petitioner never was ignorant of the potential loss of her third preference status if she did not within two years qualify as a registered nurse. So in her case there is missing any element of reliance upon the failure of a 1971 notice to specify that her status would be revoked if she did not within two years become a registered nurse.

Because there was no representation by the Attorney General or his delegate that they would not exercise their Section 205 power to revoke the plaintiff's petition on the ground of her failure to qualify as a registered nurse, and also because plaintiff did not rely on such purported representation, there is no factual basis for plaintiff's contention that she is the beneficiary of an estoppel.

Out of an abundance of caution, we may add that we are not suggesting that the Attorney General or his delegate is subject to estoppel. That is an issue which we have not considered.

On the merits of the case, judgment of the District Court, is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1779

Aurora Gazmin Navarro,

Plaintiff-Appellant,

v.

District Director of the United States Immigration and Naturalization Service,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-C-2975—*Thomas R. McMillen*, Judge.

ARGUED APRIL 5, 1976*—DECIDED SEPTEMBER 13, 1977

Before FAIRCHILD, *Chief Judge* PELL, *Circuit Judge*, and WYZANSKI, *Senior District Judge*.**

WYZANSKI, *Senior District Judge*. In the District Court for the Northern District of Illinois plaintiff filed this action against the District Director of the United States

* After oral argument April 5, 1976, it became evident that the appeal must be dismissed. A judgment was later entered and a new appeal taken and considered without further briefs or oral argument. See Navarro v. Dist. Dir. of U.S. Immig. & Natural. Serv., 539 F.2d 661 (7th Cir. 1976).

** Senior District Judge Charles E. Wyzanski, Jr. of the District of Massachusetts is sitting by designation.

Immigration and Naturalization Service. Jurisdiction was alleged on the basis of the Declaratory Judgment Act, 28 U.S.C. §2201, and the Administrative Procedure Act, 5 U.S.C. §701. Summarily stated the questions presented relate to the continued validity of the October 4, 1971 notice issued to plaintiff, Aurora Gazmin Navarro, by defendant District Director, informing her that her petition for preference classification under §203(a)(3) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1153(a)(3), had been approved.

Before we state the facts with respect to Mrs. Navarro, it will be helpful to outline the framework supplied by the Immigration and Nationality Act, hereafter called the Act, and some decisions thereunder.

It is hornbook law that an alien may be admitted to the United States as an immigrant for permanent residence or as a non-immigrant for a brief period and that, after admission to the United States in the latter status, transfer to the former status depends ordinarily on departure from the United States and reapplication to a consul for entry as an immigrant, although in particular situations departure from the United States may not be required.

Within both the immigrant and non-immigrant groups, Congress has established preferred classes. With respect to both groups, the Congress, with an important exception, has excluded those who enter pursuant to a contract to labor in the United States. Section 212(a)(14) of the Act; 8 U.S.C. §1182(a)(14). That exception to "the contract labor" barrier exists where "the Secretary of Labor has determined . . . that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa . . . and at the place to which the alien is destined

to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed."

Whether one originally sought entry as an immigrant, or, being a non-immigrant then sought to become an immigrant, he may qualify for preference in the granting of a visa for immigration as a permanent resident, pursuant to §203(a)(3) of the Act, 8 U.S.C. 1153(a)(3), which provides:

> "Visas shall next to be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a)(ii) of this title, to qualified immigrants who are members of the professions . . ."

Section 101(a)(32) of the Act, 8 U.S.C. 1101(a)(32) provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

As the government's brief concedes, nursing has been recognized by administrative regulations as a profession which qualifies for third preference classification. 29 C.F.R. 60.7. But the government does not concede that admission of an alien to the practice of the nursing profession in a foreign country, which issued its license acting on the basis of a successful completion of a post-secondary course of education and a diploma from a recognized institution of higher learning, permanently makes, for the purposes of §203(a)(3), the alien one of the "members of the professions." It is the government's contention that to be a member of the professions for the purpose of §203(a)(3), an alien who is within the United States (even if she is licensed in her home country to practice her profession)

is no longer qualified as a member of that profession if she has been here for some time and has not yet passed local United States professional examinations. Reliance by the government is on its reading of *Diaz* v. *District Director*, 468 F.2d 1206 (9th Cir. 1972); *Asuncion* v. *District Director*, 427 F.2d 523 (9th Cir. 1970); *Pizarro* v. *District Director*, 415 F.2d 481, 482 (9th Cir. 1969); and *Tang* v. *District Director*, 298 F.Supp. 413 (C.D. Col. 1969). But see *Matter of Ulandy*, 13 I. & N. Dec. 729. It is with this contention of the government in mind that we now turn to what is necessarily a rather lengthy statement of the facts in the instant case.

Plaintiff, Mrs. Navarro, was born June 7, 1947, a native citizen of the Philippines. She married a Filipino. In 1963 she completed a four-year secondary school training at St. Mary's Academy, and in April 1968 received on the basis of 5 years' study, from Dagupan Colleges School of Nursing in the Philippines, a diploma as a graduate nurse. The official transcript of the courses she took during those 5 years indicates a curriculum comparable to that of an American nursing school.

In the Philippines plaintiff received from the government a license to practice as the equivalent of a registered nurse. She was from August 1968 to September 1969 a staff nurse "to give good comprehensive nursing care" at Perpetual Succour Hospital, a private hospital, and then was from March 1970 to January 1971 a staff nurse at San Lazaro Hospital, a government hospital.

January 18, 1971, the United States Department of State issued to plaintiff (under her unmarried name) a certificate of eligibility for exchange visitor status which enabled her to engage from February 1, 1971 to January 31, 1972 at Kansas City General Hospital and Medical

Center in "an approved course in graduate nurses' training for qualified foreign nurses, to enable such foreign nationals to pursue training in their respective fields in the United States and to promote the general interests of international exchange."

On the reverse side of each Departmental certificate of eligibility for exchange visitor status is a further certificate to be executed by the person covered. While from the copy in the record before us it is not clear that plaintiff did sign her own certificate on the reverse side of the January 18, 1971 Departmental certificate, it plainly appears that on May 28, 1971 she signed the reverse side of a second or replacement certificate issued to her on that day, which set forth her married name and which had been substituted in accordance with her request for the correction of the January 18, 1971 certificate. The reverse side of each Departmental certificate is headed "Certificate of Exchange Visitor Under Section 101(a)(15)(j) of the Immigration and Nationality Act, As Amended." In Item 8 of her certificate, plaintiff said she understood "that the following conditions are applicable to exchange visitors: (b) *Limitations on Stay:* Graduate nurses—2 years; [and] (e) *Two-Year Foreign Residence Requirement:* Section 212(e) of the Immigration and Nationality Act provides as follows:

> No person admitted under section 101(a)(15)(j) or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) until it is established that such person has resided and been physically present in the country of his nationality or his last residence, or in another foreign country for an aggregate of at least two years following departure from the United States: *Provided*, That such residence in another foreign coun-

try shall be considered to have satisfied the requirements of this subsection if the Secretary of State determines that it has served the purpose and the intent of the Mutual Educational and Cultural Exchange Act of 1961 (foreign residence should be in a country having at least as great a need for your skills as the country of your nationality or last residence): *Provided further,* That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: *And provided further,* That the provisions of this paragraph shall apply also to those persons who acquired exchange visitor status under the United States Information and Educational Exchange Act of 1948, as amended."

The Secretary of Labor, acting under the previously cited §212(a)(14) of the Act, had presumably already determined that (A) there were not sufficient nurses in the United States, and (B) the employment of alien nurses would not adversely affect the wages and working conditions of American workers. Having the advantage of that determination, and having the Secretary of State's certificate of eligibility for exchange visitor status, plaintiff lawfully entered the United States as a non-immigrant on February 10, 1971. Her husband later lawfully entered the United States.

As foreshadowed in the certificate she had received from the State Department, plaintiff went to work in February

1971 at the Kansas City General Hospital and Medical Center where she remained until August 1972. From August 1972 to November 1973 she was a nurse at Trinity Lutheran Hospital, Kansas City, and then she worked in the same city from January 1974 to March 8, 1974 at Bethany Hospital and Medical Center. She is presently working as a nursing technician at Northwest Hospital, Chicago, Illinois.

While she was at the Kansas City General, she on August 11, 1971 filed with the INS, in supposed accordance with §203(a)(3) of the Act, a petition for classification as what is called a "third preference immigrant," that is, "an alien who is a member of the professions." She disclosed that she was "now in the U.S. . . . as an Exchange Visitor Nurse" and that she would "apply for adjustment of status to that of a lawful permanent resident in the office of the Immigration and Naturalization Service at Kansas City, Mo."

October 4, 1971, on Form 1-464 E (Rev. 2-1-71)N, the INS sent to plaintiff a "Notice of Third . . . Preference Petition Approved Under Section 203(a)" of the Act. In the text of the notice was a box with the heading "Validity" and with the assurance that "[t]he approval of a petition for third or sixth preference classification is valid for as long as the supporting labor certification is valid and unexpired, provided in the case of a petition for third preference classification there is no change in the beneficiary's intention to engage in the indicated profession . . ." It was further noted, "The petition has been approved. The petition states that the beneficiary is in the United States and will apply for adjustment of status to that of a lawful permanent resident. A visa number is not presently available; therefore, the beneficiary may not apply for adjust-

ment of status to that of a permanent resident. The beneficiary has been or will be notified concerning his stay in the United States."

An undated, unsigned Form 1-461 (Rev. 1-27-70), on the stationery of the INS, reached plaintiff possibly together with, or shortly before or after, Form 1-464E (Rev. 2-1-71)N. The opening paragraph informed plaintiff that:

> "The preference visa petition filed in your behalf has been approved. However, an immigrant visa is not now available to you. Therefore, you are not eligible at this time to apply for adjustment of your status to that of a lawful permanent resident. Under the circumstances you are hereby granted permission to remain in the United States until further notice. Continuation of this privilege is conditioned upon your retention of the status established in the approved petition."

It should be noted that the just-quoted grant of permission to remain in the United States appears only in an apparently unsigned letter and is not mentioned in the October 4, 1971 Form 1-464 E (Rev. 2-1-71)N.

After plaintiff's contract with the Kansas City General ended, she applied to the Missouri State Board of Nursing to take its state examinations. That board refused to allow her to take the 1971 examination because she had not studied sufficient psychiatry. In 1972 she completed her units in psychiatry by taking courses at Penn Valley Community College. Plaintiff then took in December 1972 and again in March 1973 the state nursing examinations. She passed the Medical, Pediatric, and Obstetrics examinations, but failed the Surgical and Psychiatric examinations. Nonetheless, the Missouri State Board of Nursing approved the Trinity Lutheran Hospital's hiring plaintiff as an unlicensed practical nurse.

According to plaintiff's evidence, the state board did not allow plaintiff to take the examinations in June 1973 because there were too many applicants. But the Board advised her to take them in September, 1973.

July 11, 1973, the District Director wrote plaintiff as follows:

> Mrs. Aurora Gazmin Navarro
> 6307 Bellefontaine Street
> Kansas City, Missouri
>
> Dear Mrs. Navarro:
>
> On September 20, 1971, your petition to accord you third preference status as a registered nurse was approved, and you were permitted to remain in the United States pending availability of a visa number. Although you have been in the United States since February 10, 1971, you have not yet been licensed as a registered nurse by the Missouri State Board of Nursing.
>
> Since you have failed to qualify as a registered nurse in over two years following entry, it does not appear you should have been accorded third preference; and this office contemplates revocation of the approved visa petition. You may furnish evidence by July 31, 1973, as to why you do not think the petition should be revoked. If the petition is revoked, you will have the right of appeal to the Regional Commissioner of this service.
>
> Sincerely,
>
> H. I. Major
> District Director

However, in the October 4, 1971, notice to plaintiff of the approval of her third preference status, dated September 20, 1971, as stamped on the face of plaintiff's visa petition, there is no stipulation that plaintiff, in order to retain the benefits of the approved petition, must, under the law of the United States, "qualify as a regis-

tered nurse'' within a particular period of time, or indeed ever. And, more important, the INS does not explicitly reserve the right to revoke the petition, but merely indicates that validity continues so long as ''there is no change in the beneficiary's intention to engage in the indicated profession,'' and so impliedly limits the INS's right of revocation, or more exactly, the alien's right of continued use only with respect to that specified condition.

July 17, 1973 plaintiff, in reply to the District Director's letter, set forth alleged facts as to why her approved third preference petition should not be revoked.

July 23, 1973 the Director in a letter to plaintiff, apparently incorrectly, stated that ''[a]t the time your third preference petition was approved, it was with the understanding you would meet the requirements for licensure within a reasonable time.'' There is no indication that such an ''understanding'' by plaintiff ever existed, nor that there had been promulgated regulations in which the INS had so interpreted the law. At the most, it may be claimed that if plaintiff failed to secure within the United States a license to practice nursing she ran the risk of deportation. *Bowes* v. *District Director*, 443 F.2d 30 (9th Cir. 1971); *Manantan* v. *INS*, 425 F.2d 693 (7th Cir. 1970).

November 13, 1973, following Mrs. Navarro's third unsuccessful attempt to pass the Missouri nursing examination, the District Director gave this explanation of his action:

> On July 11, 1973, you were put on notice of our intention to revoke your third preference petition approved September 20, 1971, because you had not qualified as a registered nurse in the state of Missouri. Because of your representations that you had been approved to rewrite the Missouri State Board of Nursing examination in September, 1973, you were informed that a decision would be deferred pending results.
>
> Your petition for third preference was approved because you claimed you expected to be employed as a member of the professions. Inasmuch as you again failed to pass the licensure test of the Missouri State Board of Nursing on September 12-13, 1973, you have not as yet qualified as a registered nurse, but have had to accept employment in a lesser capacity. Since you entered the United States on February 10, 1971, to take Graduate Nurse Training, it is believed you have had ample opportunity to qualify as a registered nurse.
>
> You have failed to establish that you qualify as a member of the professions as outlined in Section 203(a)(3) of the Immigration and Nationality Act, as amended.

Plaintiff appealed to the Regional Commissioner. January 23, 1974, the Regional Commissioner ''upheld'' the District Director's decision, and on August 26, 1974, he, with opinion, denied a motion to reconsider. Meanwhile, February 8, 1974 the District Director, on Form 1-210 (Rev. 9-1-70)N, notified plaintiff that she was ''required to depart from the United States . . . on or before March 8, 1974.''

While these legal steps were being taken, plaintiff had two children born in the United States: the first on June 15, 1972 during the two-year period following her original petition, and the second on November 22, 1974, after the Regional Commissioner's decision.

Following the Regional Commissioner's refusal to reconsider his decision, plaintiff brought this action, October 16, 1974, against defendant District Director. The latter

filed a motion to dismiss the complaint and for summary judgment. July 17, 1975 the District Judge granted the motion for reasons set forth in an accompanying memorandum. While expressing the view that plaintiff had proceeded improperly and prematurely, that she should have awaited a deportation order, and that she presented no actual case or controversy, the judge, nevertheless, declared that "the complaint fails to allege any basis for finding that the action of the District Director of the Immigration and Naturalization Service was arbitrary or capricious, or was in excess of his legal authority."

From the District Court's judgment dismissing the complaint, plaintiff has appealed to this Court.

The initial question is whether the District Court correctly held that it had no jurisdiction of this case because the only available judicial remedy for Navarro was to await a deportation order and then, if she chose, to petition for a writ of habeas corpus.

We differ from the District Court's conclusions on jurisdiction. What plaintiff now seeks includes a declaration that, by virtue of the notice of October 4, 1971 on Form 1-464E (Rev. 2-1-71)N, she has a valid effective, unrevoked third preference status. If she does, it follows that when a visa does become available at a consular office she, no matter where she is then living, will have a priority in securing that visa, if she is otherwise qualified for entry. Independently, of deportation, this is a valuable right. We are of opinion that the Declaratory Judgment Act, 28 U.S.C. §2201, furnishes a basis for her invocation of federal question jurisdiction, 28 U.S.C. §1331(a), to have this right declared, and that she need not await a deportation order.

We do not rely for jurisdiction on the Administrative Procedure Act, inasmuch as that channel of review seems blocked by the opinion and judgment in *Califano* v. *Sanders*, Sup. Ct. of the U.S., Oct. Term 1976, No. 75-1443, February 23, 1977, 45 U.S.L.W. 4209.

While this Court has jurisdiction to determine plaintiff's right to maintain the status conferred upon her by the October 4, 1971 notice, we must make our determination upon the administrative record before the INS. Cf. *Song Jook Suh* v. *Rosenberg*, 437 F.2d 1098, 1102 (9th Cir. 1971); *Wang Ching Shek* v. *Esperdy*, 304 F.Supp. 1086 (S.D.N.Y. 1969). We do not agree with the implications in plaintiff's prayers that the District Court was empowered to conduct a *de novo* hearing to determine "whether the plaintiff . . . is eligible and qualified for Third Preference Status" or whether plaintiff is "a professional as said term is defined in Section 203(a)(3)" of the Act. See *Kessler* v. *Strecker*, 307 U.S. 22 (1939).

Bearing in mind that it is the executive branch of the government which initially determines whether to issue a warrant for arrest of an alien believed to be deportable and which, in appropriate cases, issues warrants for deportation, and recognizing that an order directing an alien to depart does not purport to be either a warrant for arrest or a warrant for deportation, we see no basis for the prayers in plaintiff's complaint asking the District Court to "review the record of the Administrative body and its order directing the departure of the plaintiff" and "restraining the defendant from enforcing the departure of the plaintiff . . . from the United States pending the final determination of the case." See *Kladis* v. *INS*, 343 F.2d 513, 515 (7th Cir. 1965). If the pleading had been properly drawn, the District Court no doubt would have

seen that it had federal jurisdiction limited to the issues as to what status if any plaintiff had as a result of the October 4, 1971 notice and of the later administrative attempts at some kind of revocation of an approved petition.

Coming to the merits of the issues before us, we are faced with the text of the October 4, 1971 notice and what appears to be a contemporary letter on the stationery of INS. As clearly as words can state, the notice says that the status of third class preference is "valid for as long as the supporting labor certificate [*i.e.*, the certificate of the Secretary of Labor] is valid and unexpired, provided in the case of a petition for third class preference classification there is no change in the beneficiary's intention to engage in the indicated profession." What are made the tests and the sole tests of continued validity are first, continuation of the Secretary of Labor's certificates, and second, continuation of the beneficiary's intention to engage in the indicated profession.

In the case at bar there is no suggestion that the Secretary of Labor's certification has not continued. Nor can there be a plausible basis for claiming that the beneficiary no longer has the intention to engage in the nursing profession. She has a diploma from an institution of higher learning in the Philippines; she has from the Philippine government a nursing license; she has years of nursing services in the Philippines and here; she has with regularity been taking nursing board examinations; she has passed 3 out of 5 parts of those examinations; she intends to keep on trying; and, for all we know, when she moved to Illinois she may have opened up a possibility of facing examinations which would for her be easier than those of Missouri which she failed. She is today engaged as a nursing technician at a well-known Chicago hospital.

Furthermore, the INS has purported to revoke the plaintiff's status not only on a ground not expressly reserved in the notice which conferred status, but on a ground that is, to say the least, not self-evidently rational. It is by no means presumptively true that persons who fail professional examinations 3 or 4 times will never pass such examinations and be duly accredited. We have no intention of spreading on the record the names of professionals, some who later had conspicuous success, who did not get their licenses until they had failed on several different tries to pass examinations set by professional boards.

Moreover, it is by no means clear to us that §203(a)(3) furnishes support for the view of the INS that in order to be a member of a profession, within the meaning of that section, an alien who, as a result of (1) a diploma based on a course of study at a recognized institution of higher learning in a foreign country, (2) a license, and (3) actual authorized practice in that country, is an accredited member of the profession in that country, must also qualify as a member of the profession in some part of the United States. However, we need not now decide, and do not decide, that troublesome point, for it has not been fully argued before us.

All we need here to decide is that defendant did not have authority to revoke the October 4, 1971 notice on the ground that he gave, nor on the grounds given by the Regional Commissioner. Both those officials took the position that a candidate for admission to practice her profession in the United States is no longer to be regarded as a good faith candidate if within two years she has failed to secure an American license in her calling due to repeated failures to pass state examinations for admission

which she intends to continue to seek to pass, in efforts promptly to be undertaken, in accordance with (as is the case in Missouri) state law which permits successive tries by hitherto unsuccessful applicants. We also note that so far as appears plaintiff may have the possibility of taking, and the intention to take, examinations in Illinois where she now is a nursing technician.

However, we are troubled by a point which, so far as we are informed by the record and briefs, no one has yet addressed. Plaintiff, entered the United States as part of a program which, as her certification plainly revealed, was designed to train her for future work not in the United States but in her country of origin. That program is concerned with improving the capability of underdeveloped countries. When plaintiff sought to enter the United States under this program in an exchange visitor status, pursuant to §101(a)(15)(J) of the Act, she certified that she understood that she was limited to a maximum stay of two years, and that, with exceptions that seem not to be material here, she was not to be "eligible to apply for an immigrant visa . . . until such person has resided and been physically present in the country of his nationality or his last residence or in another foreign country for an aggregate of at least two years following departure from the United States."

We, sitting on appeal with a skimpy record, cannot feel sure whether this quoted language forecloses plaintiff from securing the preferences allowed by §203(a)(3). We are uninformed of the State Department's construction of, and the legislative history of §101(a)(15)(J). We do not have presented to us arguments as to whether the language of §101(a)(15)(J) and its underlying policy, interpreted with the sympathy and breadth to which they may be en-

titled, inhibit not merely the immediate eligibility of an exchange visitor to an American immigration visa but also the immediate eligibility of an exchange visitor to secure the priority inherent in a successful petition for third preference classification under §203(a)(3) of the Act.

Nor can we, who have heard neither evidence nor argument on the relevant points, feel confident that if §101(a)(15)(J) of the Act precluded plaintiff from rightfully securing the status of a §203(a)(3) preference classification, plaintiff, as the complaining party in the District Court, should now be denied relief.

In this uncertain state, we deem it appropriate merely to vacate the District Judge's judgment, to remand the case to the District Court with instructions to permit the parties to amend their pleadings, offer evidence, and make arguments in the light of the problems which we have indicated seem to us inherent in this case.

Nor do we prohibit the INS from taking in the interim any suitable independent administrative action, by deportation or otherwise. (See *Manantan* v. *INS, supra*), or from bringing an independent court action which may be suggested by the doubts we have expressed.

Judgment of the District Court vacated; case remanded to the District Court for proceedings consistent with this opinion.

PELL, *Circuit Judge,* dissenting.

The possibility that foreign citizens admitted to this country only because their professional skills are needed here might never have to qualify to use them seems to have aspects of whimsicality which even its critics would have difficulty in attributing to the Congress. I recognize that the nature of the preference system is such that

people frequently apply for this entree while residing outside the United States and would not at the time their applications are processed have been certified by American licensing authorities. No doubt, therefore, a suitable period for study and licensing is implicit in that system. But insofar as the court's statement that "the defendant did not have *authority* to revoke the October 4, 1971 notice on the ground that he gave," *ante* at 13 (emphasis added), implies that a preference once given is irrevocable despite repeated failures of the applicant to obtain the sine qua non of practicing his or her profession in this country, I respectfully dissent. Nothing in the pertinent statute limits such authority, which I think is implicit in the rationale of the professional preference system. I would also note my view that this issue, which the majority opinion purports not to decide because it was not "fully argued before us," *ante* at 13, was in fact exactly the question presented by the parties' briefs and argument.[1]

The result of the majority opinion seems to be that the Government, having failed in the October 4, 1971, notice to make express its understanding that appellant would have to qualify to practice her profession here within a reasonable time, is now estopped to assert such a basis for revoking her preference. From this aspect of the opinion, also, I must dissent. As a general matter, the United States is not subject to an estoppel which impedes the exercise of its governmental functions. 28 Am.Jur.2d *Estoppel and Waiver* §132, at 799-802 (1966). There is surely no reason to think this rule less applicable in im-

[1] I recognize that no abundance of case authorities was cited to us, and apparently such does not exist, but this would not seem to equate with a lack of full argument.

migration matters. *See Tang* v. *District Director of the U.S. Immigration and Naturalization Service*, 298 F.Supp. 413, 419-20 (C.D.Cal. 1969), and cases cited therein. Moreover, even if an estoppel were somehow permissible in this context, appellant proffers, and I perceive, no significant basis for concluding that she relied to her detriment on the failure of the October 4 notice to specify the expectation that appellant would obtain a license.

In sum, the majority's primary reliance on the lack of explicit expression in the Government's notice of October 4, 1971, appears to me to be an extreme example of *qui non negat fatetur*.

Accordingly, while I agree with the court that the district court had jurisdiction of the case, I would affirm the judgment dismissing the complaint.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AURORA GAZMIN NAVARRO,

Plaintiff,

v.

DISTRICT DIRECTOR OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Defendant.

No. 74 C 2975

DECISION ON MOTION OF DEFENDANT TO DISMISS OR FOR SUMMARY JUDGMENT

This cause involves a complaint for declaratory judgment and for a review of a decision of the Immigration and Naturalization Service under the Administrative Procedure Act, 5 U.S.C. §701 (cited in the complaint as 5 U.S.C. §1009). The defendant has filed a motion to dismiss the complaint and in the alternative a motion for summary judgment. We find in favor of the defendant on these motions.

In the first place, a declaratory judgment is not a proper remedy or cause of action in this case. The plaintiff seeks to review and reverse an order of the District Director of the Immigration and Naturalization Service that she and her family voluntarily depart from the United States. A declaratory judgment would have no executory effect upon

the defendant. However, an administrative review could result in setting aside the order and thereby afford plaintiff the relief which she seeks.

Plaintiff has taken an unsuccessful appeal to the Regional Commissioner of the Bureau of Immigration and Naturalization Service at Minneapolis-St. Paul and received an adverse decision at that level. We therefore assume that she has exhausted her administrative remedy, sinc the defendant does not contend to the contrary. However, we are inclined to believe that the final decision in a case of this sort should be contained in a deportation order which, if not set aside, would be an enforceable decision against the plaintiff. Such an order is reviewable only by the Court of Appeals, and it is our opinion that this is the scheme which Congress intended for obtaining review of decisions of the District Director of the Immigration and Naturalization Service. *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206 (1968).

In short, plaintiff's suit is premature because no actual case or controversy between the parties seems to be presented by the complaint.

Nevertheless, proceeding to the merits, the complaint fails to allege any basis for finding that the action of the District Director of the Immigration and Naturalization Service was arbitrary or capricious, or was in excess of his legal authority. It shows, on the contrary, that the voluntary departure order was justified.

Plaintiff was allowed to remain in the United States as a third preference immigrant pursuant to 8 U.S.C. §1153(a)(3) by approval of her petition on September 20, 1971. This statute authorizes a visa for "qualified immigrants who are members of the professions or who be-

cause of their exceptional ability in the sciences or arts will substantially benefit prospectively the national economy, cultural interests or the welfare of the United States". We find as a matter of statutory construction that the plaintiff is not a member of a "profession" as defined in 8 U.S.C. §1101(a)(32), which provides as follows:

> (32) The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

Plaintiff's third preference classification could more properly have been issued on the second alternative of §1153(a)(3). Although she was a registered nurse in her native country, she had merely a *desire* to become registered in the United States. The complaint alleges that the third preference was issued so long as there was no change in her intention to engage in her "profession" as a nurse, and we accept this allegation as true for the purposes of this motion.

The government's memorandum shows that the plaintiff was given four opportunities to qualify as a registered nurse in the state of her residence. Upon taking the examination given by the Missouri State Board of Nursing on four successive occasions, she passed three of the subjects and failed two. The District Director revoked the plaintiff's third preference status on November 13, 1973 after she had failed the Missouri examination, stating that she had had ample opportunity to qualify as a registered nurse and had failed to establish that she was a member of the professions outlined in §1101(a)(32), quoted above, (p. 3).

Plaintiff then moved to Chicago in March 1974 where she has been working as a practical nurse and alleges that she has a bona fide intention to engage in her profession and that all of the representations upon which her third preference petition was granted are still valid.

A review of the administrative decision of the District Director is limited to determining whether or not he has abused his discretion or exceeded his statutory authority. See *Song Jook Suh* v. *Rosenberg*, 437 F.2d 1098, 1102 (9th Cir. 1971). It is not proper for this court to go beyond the facts relied upon by the District Director or to grant the plaintiff a *de novo* hearing, as she requests. *Kessler, Director, I. & N.S.* v. *Strecker*, 307 U.S. 22 (1939). We assume that the entire administrative record is attached to the defendant's memorandum, since the plaintiff does not assert to the contrary. If this is in fact the record, we find no grounds to rule that the District Director has abused his discretion but on the contrary find that the exercise of his discretion was proper and within the confines of his authority.

Since the plaintiff was admittedly given a third preference certificate on the expectation that she would become a registered nurse in this country and since she has been given ample opportunity to achieve this status over the past four years and has failed to do so, we find and conclude that the District Director was justified in revoking her certificate. The fact that the plaintiff has borne two children since she and her husband were allowed to stay in the United States or intends to pursue her desire to become a registered nurse is irrelevant to this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant file a certified copy of the administrative record within thirty (30) days hereof and, if it conforms to the documents filed with defendant's memorandum, his motion for summary judgment will be granted pursuant to F.R.C.P. 12(b)(6).

This case will be called for a report on status on Monday, September 15, 1975 at 10:00 a.m.

ENTER:
/s/ *Thomas R. McMillen*
Judge, U. S. District Court

DATED: July 17, 1975

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Northwest Regional Office
Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

File: A19 772 215 — Kansas City
In re: Aurora Gazmin NAVARRO

REVOCATION OF APPROVAL OF THIRD PREFERENCE VISA PETITION PURSUANT TO SECTION 205 OF THE IMMIGRATION AND NATIONALITY ACT

Attorney or Representative:
Renato L. Amponin
Attorney at Law
The Connecticut Mutual Life Building
33 North Dearborn Street
Chicago, Illinois 60602

BEFORE THE REGIONAL COMMISSIONER

This matter comes forward on motion that we reconsider our January 23, 1974 decision to uphold the District Director's revocation of the petitioner's third preference visa petition.

The petitioner, a 27-year-old native and citizen of the Philippines, entered the United States as a nonimmigrant exchange visitor for graduate nurse training on February 10, 1971, and was authorized to remain in that status until January 31, 1972. On August 11, 1971 she filed a petition for classification as a third preference immigrant, which petition was approved September 20, 1971 upon the basis of the petitioner's educational achievements and expressed intent to engage in the nursing profession.

During the ensuing two-year period, the petitioner attempted on three occasions to pass the licensing examination administered by the Missouri State Board of Nursing, passage of which is a prerequisite for registration as a nurse in the State of Missouri. On each attempt the petitioner failed portions of the five-part examination, and has continued, therefore, to be ineligible for Missouri registration.

On the grounds the petitioner should not have been accorded third preference status by reason of her inability to qualify for registration as a nurse in Missouri over a two-year period, the Distict Director issued a notice of intent to revoke approval of the visa petition on July 11, 1973. Action on the intended revocation was withheld until subsequent to September 1973 in order to allow the petitioner another opportunity to write the licensing examination. After failing the September test, the petitioner was notified November 13, 1973 that approval of her third preference petition was revoked as of the date of approval.

The petitioner's defense on appeal to this office was based principally upon her claims that she would "take the licensure test every time given as long as allowed to, and until such time that I should passed (sic.)," and that she would stand for the examination again in January 1974. At that time we examined the matter thoroughly and determined that the applicant's inability to qualify for registration as a nurse in her proposed state of residence was conclusive evidence that she had no reasonable prospects of pursuing her profession in the foreseeable future. We relied upon views expressed by the Board of Immigration Appeals in *Matter of Ulanday,* 13 I. & N. Dec. 729.

Counsel for the applicant, in his motion for reconsideration, has also consulted *Ulanday* for material to bolster his argument that intent, not ability, is the prime factor to

be considered in proceedings relative to retention of a once given preference. In further support of this argument counsel cites several precedent decisions wherein alien beneficiaries of approved preference petitions were ordered excluded and deported for failure to evince a bona fide intent to engage in the profession for which they were initially classified, pointing out that his client has continually shown an intent to pursue the occupation of nurse.

Section 203(a) of the Immigration and Nationality Act, as amended, provides for preference classification of *qualified* immigrants who are members of the professions, etc. Since the issue of qualification for third preference status of the alien applicant cannot be resolved absolutely at the time of application for such status, it is not unreasonable that revocation of petition approval be accomplished where it is later determined the alien is unqualified.

In the case of *Matter of Ulanday,* supra, the alien involved was an applicant for admission to the United States as an immigrant for whom a third preference visa had been issued on the basis of her profession as an attorney in a foreign jurisdiction. The Board of Immigration Appeals held the applicant to be admissible even though she would be unable to pursue her profession for a period of years because of licensing and citizenship requirements. In short, it was the Board's view that the alien was a qualified member of the professions at entry because she had a bona fide intention of engaging in her specialized field of endeavor and reasonable prospects of doing so in the foreseeable future. Because of the prospective nature of exclusion proceedings, the Board necessarily dealt with the probability that the alien applicant would eventually become qualified as an attorney in the United States by meeting the various requirements for entry into the profession. The instant matter is distinguished from the *Ulanday* case in that there is no speculation that the applicant may

not pass the licensure examination. It is fact that she has, on repeated occasions, failed the required test. In the case at hand the prospective aspect has disappeared, and we see in retrospect that the alien has demonstrated her inability to qualify in her profession by three, possibly four, failures of the requisite examination for licensing. It is not unreasonable to expect an alien eligible for classification as a "professional" to successfully pass examinations relating to such profession over the span of one and one-half years. Nor is it unreasonable to view such failure as a lack of bona fide intent to pursue the profession, since a person with a bona fide intent could be expected to diligently study her weak subjects in order to pass the licensing examination on the second or third try.

In *Diaz* v. *District Director,* 468 F.2d 1206 (9th Cir. 1972), the court concluded that the applicant in third preference cases carries the burden of proof in establishing eligibility, and that eligibility must be established at the time of filing. The petitioner in this matter has, by actions subsequent thereto, established that she was not a qualified professional at the time of filing of the petition. Section 205 of the Act, supra, provides for revocation of a visa petition, upon notice, for what is deemed to be good and sufficient cause.

We, therefore, find for the reasons detailed above that the applicant was not qualified as a professional within the meaning of the statute at the time of initial approval of third preference classification. We do not recede from our decision of January 23, 1974.

IT IS ORDERED that the motion to reconsider be and the same is hereby denied.

/s/ *Ewing*
REGIONAL COMMISSIONER
Northwest Region

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Northwest Regional Office
Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

Jan. 23, 1974

File: A19 772 215 — Kansas City

In re: Aurora Gazmin NAVARRO

REVOCATION OF APPROVAL OF THIRD PREFERENCE VISA PETITION PURSUANT TO SECTION 205 OF THE IMMIGRATION AND NATIONALITY ACT

Attorney or Representative: Self-represented

BEFORE THE REGIONAL COMMISSIONER

This case is before me on appeal from the order of the District Director, Kansas City, revoking the September 20, 1971 approval of a third preference visa petition filed by appellant, the petitioner/beneficiary.

In his order the District Director pointed out the petitioner's continued failure to pass the licensure test of the Missouri State Board of Nursing; such failures forcing her to accept employment in a lesser capacity than that of registered nurse. On appeal, the petitioner asserts she is trying to pass the licensure test to the best of her ability, and she will continue to take the test until such time as she should pass.

In order to be considered for third preference classification, a petitioner must not only intend to pursue the profession sought, he/she must have a reasonable prospect of doing so in the foreseeable future. (Matter of Ulanday, 13 I. & N. Dec. 729) The petitioner's inability to pass the State Board test on three separate occasions over the course of a year's time is not conducive to a finding that she has reasonable prospects of pursuing her profession in the foreseeable future, notwithstanding her intent to do so. The appeal will be dismissed.

IT IS ORDERED that the appeal be and the same is hereby dismissed.

/s/ *Ewing*
Regional Commissioner
Northwest Region

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
819 U. S. COURT HOUSE
KANSAS CITY, MISSOURI 64106

Refer To This File No.
A19 772 215
Date: November 13, 1973

Mrs. Aurora Gazmin Navarro
6307 Bellefontaine Street
Kansas City, Missouri 64132

DECISION

Upon consideration, it is ordered that your petition to accord you third preference status be revoked for the following reasons:

SEE ATTACHED STATEMENT

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed *within 15 days* from the date of this notice. If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

☐ Board of Immigration Appeals in Washington, D.C. on the enclosed Forms I-290 A.

☒ Regional Commissioner on the enclosed Form I-290 B.

If an appeal is desired, the Notice of Appeal shall be executed and filed with *this* office, together with a fee of $25. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

Sincerely,

Signature Illegible
District Director

Enclosure(s)

On July 11, 1973, you were put on notice of our intention to revoke your third preference petition approved September 20, 1971, because you had not qualified as a registered nurse in the state of Missouri. Because of your representations that you had been approved to rewrite the Missouri State Board of Nursing examination in September, 1973, you were informed that a decision would be deferred pending results.

Your petition for third preference was approved because you claimed you expected to be employed as a member of the professions. Inasmuch as you again failed to pass the licensure test of the Missouri State Board of Nursing on September 12-13, 1973, you have not as yet qualified as a registered nurse, but have had to accept employment in a lesser capacity. Since you entered the United States on February 10, 1971, to take Graduate Nurse Training, it is believed you have had ample opportunity to qualify as a registered nurse.

You have failed to establish that you qualify as a member of the professions as outlined in Section 203(a)(3) of the Immigration and Nationality Act, as amended.